

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

KATHRYN BAUMAN RUBENSTEIN)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	1:07cv798-MHT
)	
BETTY JO BAUMAN, et al.,)	
)	
Defendants.)	

MOTION TO DISMISS BY McDANIEL & ASSOCIATES, P.C. AND
ROSS KENNEDY

COME NOW the Defendants, McDaniel & Associates. P.C., a professional corporation, and Ross Kennedy, an individual, by and through their undersigned attorney and requests this Court, pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss the above-styled action against these Defendants. On October 1, 2007, this Court granted an extension to each named Defendant, in which to file a response to the Plaintiff's Complaint, as amended. The Plaintiff did amend her Complaint although belatedly, and her Amended Complaint and Second Amended Complaint failed to cure the defective nature of her original Complaint as it relates to McDaniel & Associates, P.C. and Ross Kennedy. In detail, these Defendants would set forth, as bases for dismissal, the following:

1. The Federal Rules of Civil Procedure embody the concept of liberalized "notice pleading," i.e., that a complaint need only contain a statement calculated to "give the Defendant fair notice of what the Plaintiff's claim is and the grounds upon which it rests." Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002); Conley v. Gibson, 355 US. 41

(1957). As to these Defendants, the Plaintiff's Complaint fails to meet this minimum requirement, because it does not speak to each and every element of a claim or cause of action against these Defendants. In the original Complaint filed herein, the Plaintiff simply refers to McDaniel & Associates as the Defendant No. 27 by stating that McDaniel & Associates is Alabama corporation operating in Dothan, Houston County, Alabama.

As to Defendant Ross Kennedy, she simply refers to him in Paragraph 28 as follows:

- (28) Defendant, Ross Kennedy, is a practicing accountant in Dothan, Houston County, Alabama and a resident citizen of Dothan, Alabama, is an employee, officer or agent of Defendant McDaniel & Associates and is a person whose conduct proximately and directly harmed Plaintiff and is being sued individually and in his official capacity as an employee of McDaniel & Associates.

There is no additional reference to Defendants 27 or 28 in the original Complaint filed by Kathryn Bauman Rubenstein, attorney pro se on her 9/04/07 Complaint.

2. In her First Amended Complaint – as of 9/06/07 – she makes no further mention Defendants 27 or 28.

3. In her Second Amended Complaint dated as of the 4th day of October, 2007, and filed on 10/05/07, she again adopts similar language to that which was incorporated in her first Complaint by stating the following:

- (27) Defendant, McDaniel & Associates is an Alabama corporation operating in Dothan, Houston County, Alabama and a Defendant in CV-5063.
- (28) Defendant. Ross Kennedy, is a practicing accountant in Dothan, Houston County, Alabama and a resident citizen of Dothan, Alabama, is an employee, officer or agent of Defendant McDaniel & Associates and is a person whose conduct proximately and directly harmed Plaintiff, and is being sued individually and in his official capacity as an employee of McDaniel & Associates and a Defendant in CV-5063.

Civil Action No. 5063 refers to case number CV-02-5063 in the Circuit Court of Houston County, Alabama, which is referenced in the Plaintiff's addendum to the Second Amended Complaint and referenced by the Defendants in various Motions to Dismiss.

4. Rule 8(a)(2), Fed. R. Civ. P., requires the Plaintiff to make a short, plain statement of the claim showing entitlement to relief. See, Hamilton v. Allen-Bradley Co., 217 F.3d 1321, 1325 (11th Cir. 2000); and Roe v. Aware Woman Cntr. for Choice, Inc., 253 F.2d 678, 683-684 (11th Cir. 2001).

5. Plaintiff's allegations in the Complaint, First Amended Complaint, and Second Amended Complaint allege no act, omission, or wrongdoing as it relates to McDaniel & Associates and Ross Kennedy other than that which is set forth above. In short, the Plaintiff's Complaint asserts no direct conduct or indirect conduct or claim against these Defendants. Further, the Plaintiff's Complaints, Amended Complaints, etc., do not establish that these Defendants owed any "duty" to the Plaintiff because no factual background is set forth for these Defendants to be aware of how their conduct supposedly relates to any claim for which relief is sought. As a result, Plaintiff's Complaints fail to satisfy the minimal standard established under Rule 8(a)(2) as it relates to the Defendants referenced herein.

6. The Plaintiff's "prayer for relief" makes no demand for relief as to these Defendants. Plaintiff's general demand for damages "against the Defendants" is insufficient to satisfy the requirement of Rule 8(a)(3) and, in light of the above, such demand is wholly inapplicable to these Defendants.

7. In ruling on a 12(b)(6) motion pursuant to the Federal Rules of Civil Procedure, "dismissal is appropriate where it is clear the Plaintiff can prove no set of facts

in support of the claims in the Complaint.” Glover v. Liggett Group, Inc., 459 F.3d 1304, 1308 (11th Cir. 2006). As a result, because the Plaintiff has literally not stated any specific act or omission upon which to predicate any claim against these Defendants, nor has she alleged any facts to support any viable claim against these Defendants, nor has she requested any relief against these Defendants, Plaintiff has failed to comply with the requirements of Rule 8(a), Fed. R. Civ. P. As such, the Plaintiff’s Complaints are due to be dismissed in their entirety.

8. This Plaintiff has a history of filing frivolous and meritless claims against counsel, judges, parties and interested persons involved in the underlying state court action – which these Defendants were involved in the state court action – for the perceived sole purpose of harassment. See, e.g. Kathryn Bauman Rubenstein v. Betty Jo Bauman, et al., Case No. 1:06-CV-00955-MHT. As a result, these Defendants intend to seek attorney fees and costs if the Court grants this Motion to Dismiss.

9. The Plaintiff’s Complaints are also due to be dismissed under the doctrine of res judicata and the Rooker Doctrine, because these claims were asserted, and could have been asserted, in the previous state court action to which reference is made above.

WHEREFORE, the premises considered, McDaniel & Associates, P.C., and Ross Kennedy respectfully request this Court to grant their Motion to Dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P., and provide whatever other relief can be granted to these Defendants based on the Plaintiff’s conduct.

Respectfully submitted this 1st day of November, 2007.

/s/Robert M. Girardeau
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Attorney for Defendants Ross Kennedy,
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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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and I further certify that I have this day served a copy of the foregoing pleading upon the persons listed below by placing same in the U. S. Mail with adequate postage affixed thereto and addressed properly:

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/s/Robert M. Girardeau
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